80-6055

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STATE OF MISSOURI,

Petitioner/Cross-Respondent,

v.

ROLLAN ANTHONY WILLIAMS,

Respondent/Cross-Petitioner.

Cause No. 80-997

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now, Rollan Anthony Williams, hereinafter referred to as cross-petitioner, by and through his attorney, and moves this Court pursuant to 28 U.S.C. § 1915 and Rule 46 of the Supreme Court for leave to proceed in forma pauperis for the following reasons:

1. On this date cross-petitioner has filed a cross-petition for writ of certiorari in the above-captioned cause;

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2. Cross-petitioner is a prisoner in the Missouri Department of Corrections, has no means of income, and is without funds to pay the costs or fees in this cause;

3. Upon a showing of indigency in the Circuit Court of St. Louis County, Missouri, Michael J. Gorla was appointed to represent cross-petitioner and has represented him throughout the trial and appeals in state court;

4. Cross-petitioner was granted leave to file his appeal to the Missouri Supreme Court in forma pauperis following the judgment and sentence of the trial court;

5. The cross-petition for writ of certiorari in this cause is taken in good faith.

WHEREFORE, for the foregoing reasons, cross-petitioner requests leave to proceed in forma pauperis.

Respectfully submitted,

Michael J. Gorla

MICHAEL J. GORLA
Attorney for Cross-Petitioner
111 South Bemiston, Suite 211
Clayton, Missouri 63105
(314) 721-7980

A F F I D A V I T

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

MICHAEL J. GORLA, being first duly sworn on his oath states that he is an attorney licensed to practice law in the State of Missouri and has filed his application for membership to the Bar of this Court. Affiant further states that he represents cross-petitioner in this cause and the facts stated in the foregoing Motion for Leave to Proceed in Forma Pauperis are true to the best of his knowledge and belief.

Michael J. Gorla
MICHAEL J. GORLA

Subscribed and sworn to before me this 14 day of January 1981.

Catherine M. Nolan
Notary Public

My Commission Expires:
12/7/84

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STATE OF MISSOURI,

Petitioner,

v.

DONALD GREER,

Respondent,

Cause No. 80-997

*

STATE OF MISSOURI,

Petitioner,

v.

TOMMY BRYANT KENDRICK,

Respondent,

*

STATE OF MISSOURI,

Petitioner/Cross-Respondent,

v.

ROLLAN ANTHONY WILLIAMS,

Respondent/Cross-Petitioner.

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

Affiant states as follows:

1. I, Rollan Anthony Williams, am filing in this Court, through my attorney, a cross-petition for writ of certiorari in the above-captioned cause;

2. I am presently incarcerated in the Missouri Department of Corrections under a sentence imposed upon me in connection with the above-captioned cause;

3. I have no means of income and am without funds to pay the costs of this proceeding or to give security therefor;

4. I have been represented by Michael J. Gorla, an attorney appointed by the Circuit Court of St. Louis County, Missouri, throughout the proceedings in state court;

5. The cross-petition for writ of certiorari in the above-captioned cause is taken in good faith upon my belief that I am entitled to redress.

Rollan A. Williams
ROLLAN ANTHONY WILLIAMS

STATE OF MISSOURI)
) SS
COUNTY OF COLE)

Subscribed and sworn to before me this _____ day of JAN 14 198_, 1981.

OSCAR D. DUNBAR
Notary Public, State of Missouri
My Commission Expires August 1, 1984

Oscar D. Dunbar
Notary Public

My Commission Expires:

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Respondent,
*
STATE OF MISSOURI,
~~Petitioner~~/Cross-Respondent,
v.
ROLLAN ANTHONY WILLIAMS,
~~Respondent~~/Cross-Petitioner.

Cause No. ~~80-997~~

CROSS-PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI SUPREME COURT

MICHAEL J. GORLA
111 South Bemiston, Suite 211
Clayton, Missouri 63105
(314) 721-7980

Attorney for Rollan Anthony Williams
Cross-Petitioner

QUESTIONS PRESENTED

I. Is it constitutionally permissible for a prosecuting attorney to respond to a defendant's exercise of his constitutional right to trial by jury by making a recommendation to the judge that said defendant be sentenced to a term of life imprisonment after retrial where prior to retrial and after the initial trial ended in a hung jury, the prosecutor made a recommendation of a fifteen (15) year sentence in exchange for a plea of guilty?

II. Is it constitutionally permissible for a trial judge to refuse to allow a criminal defendant to amend his peremptory strikes after said defendant discovers a mistake was made in copying the strikes from his jury list to the list given to the bailiff when said mistake is discovered while the entire jury panel is in the courtroom and before the jury is sworn?

III. Is it constitutionally permissible for the Supreme Court of Missouri to require that a criminal defendant who has been denied the unrestricted exercise of his peremptory challenges show that he was prejudiced by said error before his conviction is reversed?

PARTIES

In the Supreme Court of Missouri, the parties were as follows: State of Missouri; respondent, and Rollan Anthony Williams, appellant, in Supreme Court No. 61595.

TABLE OF CONTENTS

	PAGE
Questions Presented	1
Parties	1
Table of Authorities	3
Opinion Below	4
Jurisdiction	4
Constitutional Provisions	5
Statement of the Case	6-7
Reasons for Granting Writ	7-13
Conclusion	13
Appendices	
A. State of Missouri, respondent, v. Rollan Anthony Williams, appellant, in Supreme Court No. 61595 and order overruling motion for rehearing; Letter to Justice Rendlen of the Missouri Supreme Court citing North Carolina v. Pearce, infra, and Blackledge v. Perry, infra.	A-1 - A-9
B. Section 546.180 Revised Statutes of Missouri (Supp. 1980)	A-10 - A-11

TABLE OF AUTHORITIES

CASES:	PAGES
Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed. 2d 628 (1974)	8, 9, 10
Koski v. Samaha, 491 F.Supp. 432 (D.N.H. 1980)	9, 10
Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)	11
Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979) cert. denied 100 S.Ct. 3038	9, 10
Miralce v. Estelle, 592 F.2d 1269 (5th Cir. 1979)	9
North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)	8, 9, 10
Pointer v. United States, 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208 (1894)	11
State v. Williams, 606 S.W.2d 777 (Mo. 1980)	10, 11
St. Clair v. United States, 154 U.S. 134, 14 S.Ct. 1002, 38 L.Ed. 936 (1894)	11
Stilson v. United States, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154 (1919)	11
Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965)	11, 12, 13
United States v. Groves, 571 F.2d 450 (9th Cir. 1978)	9
United States v. Tucker, 581 F.2d 602 (7th Cir. 1978)	9
United States v. Turner, 558 F.2d 535 (9th Cir. 1977)	13

OPINIONS BELOW

The opinion of the Missouri Supreme Court in the case of State of Missouri v. Rollan Anthony Williams, the case for which the cross-petition for writ of certiorari is sought, is reported at 606 S.W.2d 777 (Mo. 1980). A copy of the opinion appears in Appendix A, infra.

JURISDICTIONAL STATEMENT

In State of Missouri v. Rollan Anthony Williams, 606 S.W.2d 777 (Mo. 1980), the opinion was filed on October 15, 1980. The Court affirmed the convictions for two counts of robbery in the first degree for each of which the appellant had been sentenced to life imprisonment, and reversed two convictions for armed criminal action, for each of which the appellant had been sentenced to life imprisonment, all sentences had been directed to run concurrently. The State of Missouri's motion for a rehearing was overruled on November 12, 1980. The order overruling the motion is reprinted in Appendix A immediately after the opinion in this cause.

On December 15, 1980, the State of Missouri filed its joint petition for certiorari in the cases of State of Missouri v. Donald Greer; State of Missouri v. Tommy Bryant Kendrick; and State of Missouri v. Rollan Anthony Williams. Counsel for respondent Williams received said petition on December 16, 1980. The present cross-petition on behalf of Rollan Anthony Williams is filed within thirty days after the receipt of said joint petition, pursuant to Rule 19.5 of the United States Supreme Court, and this Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Sixth Amendment, reads as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Fourteenth Amendment, Section One, reads as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws.

Section 546.180 RSMo. (Supp 1980), is set forth in Appendix B.

STATEMENT OF THE CASE

Cross-petitioner was charged by way of indictment filed in the St. Louis County Circuit Court, State of Missouri, on June 12, 1978, with three counts of robbery in the first degree and three counts of armed criminal action. Trial by jury was commenced on February 26, 1979, in Division No. 4 of the St. Louis County Circuit Court. The trial was completed and the case sent to the jury for deliberations on March 1, 1979. After the jury deliberated for nine (9) hours and stated that it was unable to reach a verdict, the court declared a mistrial and discharged the jury.

Prior to the start of the retrial, the prosecutor offered to recommend that cross-petitioner be sentenced to concurrent fifteen (15) year terms in exchange for his pleas of guilty to the pending charges (T.235). The cross-petitioner refused the offer and this cause came to trial before a jury in Division No. 18 of the Circuit Court of St. Louis County, Missouri, on April 23, 1979.

After the questioning of prospective jurors was completed, the prosecutor made a list of his strikes and handed them to the bailiff and the defense attorney. The defense attorney then made a list of his strikes and handed them to the bailiff. With the aid of the prosecutor's and cross-petitioner's lists, and in the presence of the jury panel, the court began to seat the jury. Venireman McKenna was the second member of the jury panel called and seated in the jury box. As soon as Venireman McKenna was seated, the defense attorney approached the bench and informed the court that he had made a mistake in transcribing his strikes from his notes to the list he gave to the bailiff. Defense attorney then made a motion to amend his peremptory challenges to strike Venireman McKenna and remove one strike from the list he turned over to the bailiff (T.71). The court overruled cross-petitioner's motion and the jury was then seated and sworn (T.71). On April 24, 1979, the jury returned verdicts of guilty on Count I, robbery in the first degree, Count II, armed criminal action, Count III, robbery in the first degree, and Count IV, armed criminal action.

Cross-petitioner's motion for new trial was timely filed and overruled on July 27, 1979, and on that same day, cross-petitioner came before Division No. 18 of the Circuit Court of St. Louis County, Missouri for sentencing. At the sentencing, the prosecutor recommended cross-petitioner be

sentenced to a term of life imprisonment on each count with each term to run concurrent (T.235-236). In spite of cross-petitioner's objection to the prosecutor's recommendation on the ground that cross-petitioner was being punished for exercising his right to trial by jury, the court sentenced cross-petitioner to a term of life imprisonment on each count, with each term to run concurrent (T.235-237).

On appeal, the Missouri Supreme Court held that cross-petitioner was not denied the exercise of his peremptory challenges because he could show neither an abuse of discretion on the part of the trial judge in refusing to allow him to amend his strikes nor that he was prejudiced by the action of the trial court. Said court also held that the increase in the prosecutor's recommendation made after trial did not amount to punishment to cross-petitioner for exercising his right to trial by jury. In accordance therewith, cross-petitioner's judgment and sentence was affirmed as to Count I, robbery in the first degree, and Count III, robbery in the first degree. Cross-petitioner's convictions on Counts II and IV, armed criminal action, were reversed on the grounds that Counts I and III were lesser included offenses of Counts II and IV respectfully, and thus said convictions were in violation of the double jeopardy provision of the United States Constitution.

THE REASONS FOR GRANTING THE WRIT

I. Is it constitutionally permissible for a prosecuting attorney to respond to a defendant's exercise of his constitutional right to trial by jury by making a recommendation to the judge that said defendant be sentenced

to a term of life imprisonment after retrial where prior to retrial and after the initial trial ended in a hung jury, the prosecutor made a recommendation of a fifteen (15) year sentence in exchange for a plea of guilty?

Cross-petitioner submits that a writ of certiorari should issue to review the judgment of the Supreme Court of Missouri because the conduct of the prosecuting attorney in his case amounted to a due process violation under this Court's decision in Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974).

In Blackledge, supra, this Court considered whether it was constitutionally permissible for a prosecutor to respond to a criminal defendant's exercise of his statutory right to obtain a trial de novo after a trial and conviction on a misdemeanor charge, by indicting said defendant on a felony charge covering the same conduct. This Court held that the prosecutor had a stake in discouraging appeals, and that the indictment of the defendant on a harsher charge created a reasonable apprehension of vindictiveness on the part of the prosecutor and could have a chilling effect on those defendants who thought of exercising their right to appeal and obtain a trial de novo. The rationale of Blackledge was not based on the proof of actual vindictiveness on behalf of the prosecutor, but rather on the premise that due process requires that "a person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one." Blackledge v. Perry, 417 U.S. 26 at 27, 94 S.Ct. 2098 at 2102. Blackledge was an extension of the rule laid down in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), relating to judicial vindictiveness. In Pearce, this Court held that is was impermissible for a judge to sentence a defendant who had successfully challenged his conviction on appeal to a harsher sentence after a retrial without some on the record facts justifying the harsher sentence.

Together, Pearce and Blackledge stand for the proposition that a criminal defendant is entitled to exercise his constitutional and statutory rights without a reasonable apprehension that either a judge or a prosecutor will use their power to retaliate against him. There is no need to show actual vindictiveness to gain relief but instead, the appearance of vindictiveness is sufficient on its face to justify relief or to require the judge or the prosecutor to justify their conduct. Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979) cert. denied 100 S.Ct. 3038; Miracle v. Estelle, 592 F.2d 1269 (5th Cir. 1979); United States v. Tucker, 581 F.2d 602 (7th Cir. 1978); United States v. Groves, 571 F.2d 450 (9th Cir. 1978); Koski v. Samaha, 491 F.Supp. 432 (D.N.H. 1980).

Cross-petitioner submits that the action of the prosecutor in his case comes within the type of conduct prohibited by Blackledge v. Perry, supra. After cross-petitioner's first trial ended in a hung jury, the prosecutor offered to recommend a fifteen (15) year sentence in return for cross-petitioner's pleas of guilty. Cross-petitioner refused the offer, went to trial, and was convicted by a jury. After conviction, the prosecutor upped the ante and recommended that cross-petitioner be sentenced to a term of life imprisonment.

The action of the prosecutor in unilaterally upping his recommendation after trial appears to be a vindictive response to punish the cross-petitioner from exercising his constitutional right to trial by jury. It is this appearance of vindictiveness that may cause other criminal defendants to forego their right to a jury trial, and exactly the kind of danger that Blackledge v. Perry, supra, is designed to protect against. Despite the fact that it was presented with the argument that the conduct of the prosecutor constituted a due process violation under Blackledge, and Pearce, the Missouri Supreme Court ignored the conduct of the prosecutor and based its

decision on a finding that the trial judge had not been a party to the plea bargain and that the cross-petitioner "has not demonstrated that the trial court's sentence was retaliatory for the defendant's exercise of his right to trial by jury." State of Missouri v. Williams, 606 S.W.2d 777, 779. The fact that the trial judge did not participate in the pre-trial offer of a fifteen (15) year sentence to the cross-petitioner does not detract from the conduct of the prosecutor. While a prosecutor has a great deal of discretion, there is a limit to what he can do, and that limit has been exceeded herein. See Lovett v. Butterworth, 610 F.2d 1002 (1st Cir. 1979) cert. denied 100 S.Ct. 3038; Koski v. Samaha, 491 F.Supp. 432 (D.N.H. 1980). Furthermore, the Missouri Supreme Court misinterpreted Blackledge and Pearce by requiring the cross-petitioner to prove that he was sentenced to life imprisonment in retaliation for exercising his right to trial by jury. According to Blackledge and Pearce, there is no need to show actual vindictiveness. Once there is a reasonable appearance of vindictiveness shown on the part of either a prosecutor or a judge, a prima facie due process violation is proven.

In conclusion, the action of the prosecutor herein comes within the type of conduct condemned in Blackledge v. Perry, supra, and the judgment of the Missouri Supreme Court denying the cross-petitioner relief conflicts with said decision of this Court. Therefore, cross-petitioner respectfully requests that his cross-petition for writ of certiorari be granted.

II. Is it constitutionally permissible for a trial judge to refuse to allow a criminal defendant to amend his peremptory strikes after said defendant discovers a mistake was made in copying the strikes from his jury

list to the list given to the bailiff when said mistake is discovered while the entire jury panel is in the courtroom and before the jury is sworn?

III. Is it constitutionally permissible for the Supreme Court of Missouri to require that a criminal defendant who has been denied the unrestricted exercise of his peremptory challenges show that he was prejudiced by said error before his conviction is reversed?

Cross-petitioner submits that a writ of certiorari should issue in this case to review the judgment of the Missouri Supreme Court because said decision conflicts with the applicable decisions of this Court regarding a criminal defendant's exercise of his peremptory challanges.

Section 546.180, RSMo. (Supp. 1980) reads that "(i)n all criminal cases, the defendant shall be entitled" to a certain number of peremptory challenges. This Court addressed itself to the importance of peremptory challenges in Swain v. Alabama, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed. 2d 759 (1965),

> "Although '(t)here is nothing in the Constitution of the United States which requires the Congress (or the States) to grant peremptory challenges,' Stilson v. United States, 250 U.S. 583, 586, 40 S.Ct. 28, 30, 63 L.Ed. 1154, nonetheless the challenge is 'one of the most important rights secured to the accused,' Pointer v. United States, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208. The denial or impairment of the right is reversible error without a showing of prejudice, . . . '(F)or it is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its purpose.' Lewis v. United States, 146 U.S. 370, 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011."

In St. Clair v. United States, 154 U.S. 134, 14 S.Ct. 1002, 38 L.Ed. 936 (1894), this Court stated that "any system for the impaneling of a jury

that prevents or embarrasses the full, unrestricted exercise of the accused, of his right of peremptory challenge must be condemned."

Cross-petitioner submits that he was denied the unrestricted exercise of his peremptory challenges by the action of the trial judge who refused to allow him to amend his strikes after cross-petitioner discovered that he made a mistake in transcribing his strikes from his list of jurors to the list used to seat the jury. Said mistake was realized when the entire jury panel was in the courtroom and before the jury was sworn (T.70-71). This issue was raised before the Supreme Court of Missouri and cross-petitioner's claim for relief was denied on the grounds that said request to amend was within the discretion of the trial judge and that cross-petitioner failed to prove an abuse of discretion and any prejudice resulting from the trial court's ruling. State v. Williams, 606 S.W.2d 777 (Mo. 1980).

The basis of the Missouri Supreme Court decision is at odds with this Court's teachings as to a defendant's exercise of his peremptory strikes. As mentioned earlier herein, once a defendant is granted peremptory challenges, he is entitled to the full, unrestricted exercise of said challenges and any action that denies him such must be condemned. Swain v. Alabama, supra. Contrary to the holding of the Missouri Supreme Court, a trial judge does not have the discretion to deny a defendant an amendment of his strikes when the request is made before the jury is sworn and while the entire jury panel is present in the courtroom. Since under the procedure in Missouri, a defendant makes his strikes after the prosecutor, the prosecutor certainly isn't prejudiced by allowing such an amendment and there is no good reason to deny such an amendment. Furthermore, this Court has held that an error in the restriction of a defendant's exercise of his peremptory strikes

is reversible error without a showing of prejudice. Swain v. State of Alabama, supra.; United States v. Turner, 558 F.2d 535 (9th Cir. 1977); The Missouri Supreme Court, in denying relief on the ground that the cross-petitioner did not show he was prejudiced by the trial court's refusal to allow the amendment, directly contradicts this Court's prior decisions.

Cross-petitioner prays that this Court issue a writ of certiorari in view of the conflict existing between the law in the area of the exercise of peremptory strikes as interpreted by Missouri and as stated by this Court.

CONCLUSION

For the foregoing reasons, the cross-petition for writ of certiorari should be granted.

Respectfully submitted,

Michael J. Gorla

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Clayton, Missouri 63105
(314) 721-7980

Attorney for Cross-Petitioner

Supreme Court of Missouri

DIVISION I

STATE OF MISSOURI,)
)
Respondent,)
)
vs.) No. 61595
)
ROLLAN ANTHONY WILLIAMS,)
)
Appellant.)

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
HONORABLE PHILIP SWEENEY, JUDGE

A jury in the St. Louis County Circuit Court found Rollan Anthony Williams guilty on two counts of robbery in the first degree and two counts of armed criminal action. The court, acting under the Second Offender Act, sentenced the defendant to life imprisonment on each of the four counts, the sentences to run concurrently. This appeal followed.

The state's evidence showed that, on April 28, 1978, at around 6:45 P.M., Williams entered Hartwig's Tavern in Creve Coeur, St. Louis County, took a seat at the bar and was served a bottle of Budweiser beer. A short time later a second person entered the tavern and requested and was served a glass of water at the bar. Williams ordered a second beer and after he had been at the bar for about 15 minutes, he and the man to whom the water had been served pulled pistols and announced a holdup to the bar manager and other customers. Money belonging to the tavern owner was taken and the billfolds of at least two customers.

On May 18, 1978, Williams was arrested for the robbery and identified at a line-up by the bar manager. The bar manager identified Williams at his trial. Fingerprint technicians found Williams's palm print on one of the beer bottles from which he drank at the tavern.

Williams was charged with robbery in the first degree. One count was directed at the taking of the tavern money, the second at the taking of a customer's wallet and money. A charge of armed criminal action was filed to each of the two robbery counts.

Williams offered two witnesses who testified to an alibi. The jury found the defendant guilty of each of the four counts.

In this Court, appellant complains of the trial court's refusal to allow his attorney to amend his peremptory challenges after he advised the court that he had incorrectly transcribed the strikes from his list to the list given to the bailiff. Appellant complains that the court's ruling denied appellant his statutory right to exercise of his peremptory challenges.

Appellant's brief states that the error involved came to his attention when Venireman McKenna was instructed by the bailiff to take seat No. 2 in the jury box. The brief states that appellant had intended to strike McKenna and that his attorney immediately notified the court of his mistake. However, the transcript which must be the basis for this Court's review shows that 12 jurors and one alternate were seated and that defense counsel thereafter advised the court of his error, that he had intended to strike McKenna and " * * * that because of the error on my part I didn't write it down on my list and consequently I strike an extra person." He requested leave of court to amend his strike to remove McKenna and to take off one of the strikes he had given the bailiff. The court overruled the request.

A request to permit amendment of peremptory strikes before a jury is sworn is addressed to the trial court's discretion. State v. Brown, 554 S.W. 2d 574, 578[7] (Mo. App. 1977); State v. Blankenship, 536 S.W. 2d 520, 521-522[7] (Mo. App. 1976); State v. Harris, 356 S.W. 2d 889, 890-891[2] (Mo. 1962).

Appellant has shown no abuse of discretion in this situation. Although the record indicates that the jurors not selected had not been excused, contrary to the situation in Harris, the trial court's ruling is not for that reason an abuse of discretion. In view of the timing of the request as shown by the transcript, the trial court might well have felt that a change at that juncture would have presented problems. Appellant's complaint is that the trial court's action denied him the right to make his peremptory challenges as he saw fit. However, he acknowledges that he can demonstrate no prejudice as a result of the court's ruling. He acknowledges that there was no basis for a challenge for cause against McKenna and relies upon a feeling, based on voir dire, that McKenna would not be a favorable juror. Appellant's cases involving the seating of a juror who should have been disqualified for cause are not in point.

No abuse of discretion and no prejudice having been demonstrated, this claim of error is rejected.

Appellant complains of the trial court's denial of his request for a mistrial because a police officer testified that a woman (presumably the tavern manager) picked appellant out of a line-up. Objection to the testimony was promptly sustained and the jury instructe to disregard it but the request for a mistrial was denied. Appellant contends that State v. DeGraffenried, 477 S.W. 2d 57 (Mo. 1972), and State v. Johnson, 538 S.W. 2d 73 (Mo. App. 1976), required a mistrial because of this testimony.

Johnson applied the DeGraffenried test for determining the prejudicial effect of the erroneous admission of testimony. The question here is whether Degraffenried required a declaration of a mistrial because the testimony had been heard by the jury.

Degraffenried is distinguishable because the objection was overruled to the police officer's testimony regarding a state's eyewitness's line-up identification of the defendant. Although under Degraffenried the fact that the eyewitness herself had previously testified to her line-up identification of the defendant would not necessarily have rendered the officer's testimony harmless error had it been allowed to stand, over objection, the trial court could properly take that fact into consideration in determining the corrective measure called for. Given the drastic nature of the remedy of a mistrial, DeGraffenried does not require a mistrial on every case where such testimony slips into a trial. A proper exercise of discretion is still allowed insofar as declaring a mistrial is concerned and the trial court here did not abuse its discretion. See State v. Brown, 528 S.W. 2d 503, 506[7] (Mo. App. 1975); State v. Washington, 549 S.W. 2d 547-549[3] (Mo. App. 1977).

Appellant contends that he was unconstitutionally penalized for exercising his right to a jury trial in that the court, on the state's recommendation, imposed four life sentences, whereas the state, prior to trial, had offered a sentence of four 15-year terms in return for a plea of guilty. Appellant relies upon People v. Dennis, 28 Ill. App. 3d 74, 328 N.E. 2d 135 (1975), as closely parallelling his case. In Dennis, in pretrial plea bargaining, participated in by the court with full knowledge of the defendant's past record and the state's pending case, the court had stated its willingness to accept the state's recommendation of a two to six-year sentence in return for a

guilty plea. The defendant rejected that offer and when found guilty on a jury trial, the court, following the state's recommendation, imposed a 40 to 80-year sentence. Upon post-conviction review, the court upheld the defendant's contention that the heavier sentence had been imposed for the defendant's exercise of his right to jury trial. The court noted the absence of anything in the record to justify the heavy sentence imposed.

The distinguishing feature between that case and this is the judge's participation in the plea bargaining in Dennis. In this case, the trial judge was not a party to the plea bargaining. The fact that his sentences coincided with the state's recommendation does not charge him with responsibility for or approval of the pre-trial offer. Dennis recognizes the distinction between this situation and that presented in Dennis and notes that " * * * a mere disparity between the sentence offered during plea bargaining and that ultimately imposed, of itself, * * * " does not provide a basis for relief. 328 N.E. 2d 138[5].

Appellant has not demonstrated that the trial court's sentence was retaliatory for the defendant's exercise of his right to trial by jury. State v. Volner, 569 S.W. 2d 781 (Mo. App. 1978).

Under Sours v. State, 593 S.W. 2d 208 (Mo. banc 1980); vacated, Missouri v. Sours, ___ U.S. ____, 64 L. Ed. 2d 820 (1980); on remand, Sours v. State, ___ S.W. 2d ____ (Mo. banc No. 61458, August 18, 1980), the convictions for armed criminal action cannot stand.

Judgment affirmed as to Counts I and III; reversed as to Counts II and IV.

Robert R. Welborn, Commissioner

Morgan, J., concurs; Donnelly, J., concurs in separate concurring opinion filed; Rendlen, P.J., concurs in result.

Supreme Court of Missouri

DIVISION I

DUPLICATE
OF FILING ON
OCT 15 1980
CLERK SUPREME COURT

STATE OF MISSOURI, Respondent,	)	
vs.	)	No. 61595
ROLLAN ANTHONY WILLIAMS, Appellant.	)	

CONCURRING OPINION

Few would contend that the position of the United States Supreme Court, reference the National Double Jeopardy Clause, is presently coherent. See Westen and Drubel, Toward a General Theory of Double Jeopardy; 1978 The Supreme Court Review 81 (Chicago: The Univ. of Chicago Press, 1979).

In this circumstance, the attempt of the majority in Sours v. State, _____ S.W.2d _____ (Mo. banc No. 61458, August 18, 1980) to follow the twists and turns of the United States Supreme Court in this area of the law is almost masochistic. In North Carolina v. Butler, 441 U.S. 369, 376 (1979) the Court stated that it will "accept whatever construction of a state constitution is placed upon it by the highest court of the State."

First, I would disentangle and hold:

(1) That Mo. Const. art. I, § 19 proscribes a second prosecution for the same offense after acquittal.

(2) That to cause a person to be twice prosecuted for the same offense after conviction is to deprive that person of due process of law. Mo. Const. art. I, § 10.

(3) That to cause a person to be twice punished for the same offense is to deprive that person of due process of law. Mo. Const. art. I, § 10.

Second, I would implement (1) and (2), supra, by applying Mr.

Justice Brennan's "same transaction" test and require "the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." Ashe v. Swenson, 397 U.S. 436, 453, 454 (1970). (Brennan, J., concurring). See also ALI, Model Penal Code, Proposed Official Draft §§ 1.07, 1.08, 1.09 (1962).

Third, I would implement (3), supra, by proscribing punishment in excess of what the Missouri General Assembly intended.

I concur under the compulsion of Sours, supra.

Robert T. Donnelly, Judge

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
JEFFERSON CITY, MISSOURI
65101

THOMAS F. SIMON
CLERK

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November 12, 1980

Mr. Michael J. Gorla
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Mr. Lew A. Kollias
Asst. Attorney General
P.O. Box 899
Jefferson City, MO 65102

In Re: State of Missouri, resp., vs.
Rollan Anthony Williams, app.
Supreme Court No. 61595

Gentlemen:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Very truly yours,

Thomas Simon

Clerk

MICHAEL J. GORLA
ATTORNEY AT LAW
111 SO. BEMISTON, SUITE 211
CLAYTON, MISSOURI 63105

OFFICE 721-7980
HOME 781-2871

May 22, 1980

Honorable Albert L. Rendlen, Presiding Judge,
Division One
Supreme Court Building
Jefferson City, Missouri 65102

In re: State of Missouri vs. Rollan Williams
No. 61595

Dear Justice Rendlen:

Per your request, the cites of the two United States Supreme Court cases that I referred to in my argument are as follows:

North Carolina v. Pearce 395 U.S. 711, 89 S. Ct. 2072, 23 L. ED. 2d 656 (1969)

Blackledge v. Perry 417 U.S. 21, 94 S. Ct 2098, 40 L. Ed. 2d 628 (1975).

As you will recall, these two cases were not cited in appellant's brief.

Very truly yours,

Michael J. Gorla
111 So. Bemiston, Suite 211
Clayton, Mo. 63105
(314) 721-7980
Attorney for Appellant

cc: Attorney General

MJG/eal

APPENDIX B

Section 546.180, RSMo. (Supp. 1980) reads as follows:

Peremptory challenge, number allowed.-- 1. In all criminal cases the state and the defendant shall be entitled to a peremptory challenge of jurors as follows:

(1) If the offense charged is punishable by death, the state shall have the right to challenge nine and the defendant nine;

(2) In all other cases punishable by imprisonment in the penitentiary, the state shall have the right to six and the defendant to six;

(3) In all cases not punishable by death or imprisonment in the penitentiary, the state and the defendant shall each have the right to challenge two.

2. When several defendants are tried together, the following provisions shall apply:

(1) Each defendant then on trial shall be allowed separate peremptory challenges as provided in subsection 1;

(2) The number of peremptory challenges allowed the state by subsection 1 of this section shall be multiplied by the number of defendants then on trial in each case.

3. In all criminal cases, a list of the jurors found by the court to be qualified to sit in the case shall be forthwith delivered by the clerk of the court to the attorney for the state who shall thereupon and within such time as may be directed by the court, announce of indicate the challenges for the state. The jury list, with the state's challenges indicated thereon, shall

then be forthwith delivered to the defendant or his attorney, who shall thereupon announce or indicate his challenges and return the list into court within such time as may be ordered by the court, and the remaining twelve, the first twelve next remaining on the list unchallenged, shall be the jury to try the cause.

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IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

No. ~~80-997~~ 80-605

STATE OF MISSOURI,

Petitioner/Respondent,

v.

ROLLAN ANTHONY WILLIAMS,

Respondent/Petitioner.

RESPONSE TO CROSS-PETITION FOR CERTIORARI

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of Counsel

QUESTIONS PRESENTED

Whether it is constitutionally permissible for a prosecuting attorney to recommend a higher sentence of punishment after a trial by a jury and a guilty verdict then that originally recommended by the prosecutor prior to trial in exchange for a plea of guilty?

Whether it is permissible for a trial judge not to allow a defendant to amend his peremptory strikes after both counsel for the state and defense had exercised their strikes and a jury had been seated but not sworn? Further, whether it is permissible to require a defendant on appeal to show that he was prejudiced by the trial court's refusal to allow said defendant to amend his peremptory challenges after they had been exercised?

PARTIES

In the Supreme Court of Missouri, the parties were as follows: Rollan Anthony Williams, appellant, and State of Missouri, respondent.

TABLE OF CONTENTS

PAGE

Question Presented I

Parties I

Table of Contents II

Table of Authorities III

Opinion Below 1

Jurisdiction 2

Constitutional and Statutory Provisions 2

Statement of Facts 3

Argument

I. 6

II. 8

Conclusion 15

TABLE OF AUTHORITIES

CASES:	PAGE
Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974)	6
Bordenkircher v. Haynes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978)	7, 8
Cole v. Wainwright, 614 F.2d 67 (5th Cir. 1980)	7
Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978)	7
Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892)	12
State v. Blankenship, 536 S.W.2d 520 (Mo.App., Spr.D. 1976)	13
State v. Bluitt, 592 S.W.2d 752 (Mo.banc 1980)	13
State v. Brown, 554 S.W.2d 574 (Mo.App., St.L.D. 1977)	13
State v. Harris, 356 S.W.2d 889 (Mo. 1962)	13
State v. Williams, 606 S.W.2d 777 (Mo. 1980)	1
Stilson v. United States, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154 (1919)	8
United States v. Vargas, 606 F.2d 341 (1st Cir. 1979)	8
Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 58 L.Ed.2d 466 (1965)	8, 12
United States v. Caldwell, 543 F.2d 1333 (D.C.Cir. 1974)	11
United States v. Gardner, 611 F.2d 770 (9th Cir. 1980)	7
United States v. Litton Systems, Inc., 573 F.2d 195, (4th Cir. 1978), cert. den. in 439 U.S. 828	7
United States v. Lepera, 443 F.2d 810 (9th Cir. 1971)	14
United States v. Turner, 558 F.2d 535 (9th Cir. 1977)	12
CONSTITUTIONAL PROVISIONS:	
U.S. Constitution, Amend. VI	2
U.S.Constitution, Amend. XIV	2
STATUTES:	
28 U.S.C. § 1257 (3)	2
§ 546.180, RSMo 1977 Supp	2
§ 546.180, RSMo Supp. 1980	2
§ 556.280, RSMo 1969	5

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1980

No. 80-997

ROLLAN ANTHONY WILLIAMS,

Cross-Petitioner,

v.

STATE OF MISSOURI,

Respondent.

RESPONSE TO CROSS-PETITION FOR CERTIORARI

OPINION BELOW

Cross-petitioner (hereinafter referred to as "petitioner") was convicted by a jury of the offenses of two counts of first degree robbery and two counts of armed criminal action, on April 24, 1979. On June 1, 1979, petitioner filed a motion for new trial which was denied on July 27, 1979. On August 2, 1979, petitioner appealed his convictions to the Supreme Court of Missouri, which affirmed those convictions at State v. Williams, 606 S.W.2d 777 (Mo. 1980). A copy of this opinion appears in Appendix A, pages 1 through 7, of the petitioner's cross-petition for writ of certiorari.

Petitioner subsequently filed in the Supreme Court of Missouri a motion for rehearing. The motion and application were denied by that court on November 12, 1980. A copy of this ruling appears in petitioner's Appendix A, page 8, of his cross-petition.

JURISDICTION

Petitioner claims the violation of his rights, guaranteed to him by the Sixth Amendment and the Fourteenth Amendment of the United States Constitution, and therefore invokes this Court's jurisdiction under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner urges violations of his Sixth and Fourteenth Amendment rights guaranteed by the federal constitutional. The Sixth Amendment reads:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment, Section 1, provides:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws."

Petitioner has included § 546.180, RSMo Supp. 1980, in his Appendix B. However, the relevant Missouri statute at the time of petitioner's trial was § 546.180, RSMo Supp. 1977, which read, in relevant part, as follows:

"(1) If the offense charged is punishable by death or by imprisonment in the penitentiary for life, the state shall have the right to challenge six and the defendant twelve, and no more."

STATEMENT OF FACTS

On the evening of April 28, 1978, at around 6:45 p.m., petitioner entered Hartwig's Tavern, sat at the bar, and ordered a bottle of beer (Transcript on appeal in cause no. 61595, page 81; hereinafter referred to as Tr.). Several minutes later, petitioner's accomplice approached the bar and ordered a glass of water (Tr. 82). Shannon Schultz, the bartender-manager, was the only employee on duty at that time (Tr. 78, 79). The petitioner ordered another beer (Tr. 83), and shortly after that, came to the end of the bar and pointed a gun at Schultz (Tr. 84, 123). Petitioner's accomplice then also produced a weapon, and forced two male patrons to stand against the wall (Tr. 123, 135). Another customer then came out of the restroom, and was forced up against the wall with the other two men (Tr. 124, 137). These three male patrons were subsequently placed in the restroom after the accomplice of petitioner had taken the wallet from one of the male victims (Tr. 124, 136, 138).

In the meantime, petitioner grabbed a paper bag and forced Schultz to empty the contents of the cash register into the bag (Tr. 86). After petitioner took some money from a drawer, he forced Schultz into a backroom (Tr. 87). When the victim, Schultz, told the petitioner that there was no more money, petitioner threatened to "blow her head off" if she did not tell the truth (Tr. 88). Schultz then showed petitioner where the rest of the money was, and after searching through her underwear for more money, petitioner forced Schultz to join to the other men in the restroom (Tr. 88, 89, 93).

Shortly after petitioner and his accomplice had left the scene of the crime, the victim summoned help, and the police arrived (Tr. 94, 124). Fingerprint samples were taken from a

bottle of beer on the bar where petitioner was sitting (Tr. 105, 150, 165, 166). A palmprint taken from that beer bottle at the scene was identified as petitioner's (Tr. 176, 180, 191).

Several weeks after the robbery, on May 18, 1978, the police took Schultz and one of the male victims to a police station to view a lineup (Tr. 106, 125, 142). Schultz positively identified the petitioner at the lineup and in- court as her assailant (Tr. 108, 110). The male victim identified petitioner from a profile view in the lineup as the robber (Tr. 127), although he could not give a "one-hundred percent" positive identification of petitioner (Tr. 129).

Petitioner presented two witnesses, and one of the witnesses testified that, at around the time of the crime on the night in question, petitioner and a friend were at her house (Tr. 212).

Petitioner's first trial resulted in a mistrial when the jury could not return a verdict (Tr. 14). Subsequently, a second trial was held, which resulted in the conviction of petitioner currently under attack in the present action. Prior to the commencement of trial, and after the voir dire of the jury by defense counsel and the state was completed, the record indicates that both counsel for defense and state gave their strikes to the bailiff (Tr. 69, 70). A twelve member jury was then seated (Tr. 70), when defense counsel approached the bench, and the following occurred:

> "MR. GORLA: Judge, at this point I'm going to advise the court that when I copied my strikes from my list to the list I gave to the Bailiff, that I made a mistake. That I intended to strike the # 4 juror, Mr. Edward McKeena and that because of the error on my part I didn't write it down on my list and consequently I strike an extra person. At this point I'd ask leave of court that I could amend my strikes and strike # 4 and also take off one of the strikes that I gave to the Bailiff.
>
> THE COURT: It will be overruled.

MR. GORLA: Okay, Judge." (Tr. 71).

The jury was then sworn (Tr. 71), and the trial commenced.

As previously mentioned, the petitioner was convicted of two counts of first degree robbery and two counts of armed criminal action based upon the foregoing evidence (Tr. 229, 230). The trial court was to fix the petitioner's punishment, pursuant to finding that petitioner was subject to Missouri's Second Offender Act[1] (Tr. 197). Prior to fixing punishment, defense counsel indicated that the prosecutor had offered petitioner four concurrent fifteen year sentences for the aforementioned charges upon a plea of guilty, and defense counsel now felt that petitioner should not be sentenced to any term of years longer than fifteen years, as to do otherwise, would punish the petitioner for exercising his constitutional right to a jury trial (Tr. 235, 236). The prosecutor indicated that the court was not involved in any pretrial negotiations between the parties, and that the increased recommendation of life imprisonment for each offense was based upon information included in a pre-sentence investigation report which the state was not previously aware of (Tr. 236). The court then sentenced petitioner to four concurrent terms of life imprisonment for the aforementioned offenses (Tr. 237).

---

[1] § 556.280, RSMo 1969, repealed Laws 1977, in effect at the time of petitioner's trial.

ARGUMENT

I.

On his first point for issuance of a writ of certiorari, petitioner contends that prosecutorial vindictiveness denied him due process of law under the Fourteenth Amendment. Specifically, petitioner alleges that, after the first trial resulted in a mistrial, the prosecutor offered petitioner four, fifteen-year concurrent sentences on the four aforementioned offenses in exchange for a plea of guilty. The petitioner refused said offer, went to trial, was convicted, and at the time of sentencing, the prosecuting attorney then recommended life imprisonment. Petitioner contends that this conduct displayed prosecutorial "vindictiveness" that amounted to a due process violation under Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974), which should cause a reversal of his conviction. Respondent contends that no constitutional deprivation was displayed by the conduct of the prosecuting attorney in the case at hand, and the writ of certiorari should not issue.

The record does not support the petitioner's claim that the prosecutor's recommendation of life sentence was a vindictive action to "punish" the petitioner for exercising his right to a jury trial and refusing the plea offer of the prosecuting attorney. At the time of sentencing, the prosecuting attorney indicated that he had read the pre-sentence investigation report which made the prosecutor aware, for the first time, of certain factors about the petitioner's personality which would make a sentence of life imprisonment very appropriate for the petitioner (Tr. 236). Therefore, the record does not support the petitioner's allegation of prosecutorial vindictiveness, but rather indicates that the prosecutor's recommendation for sentencing was based upon the pre-sentence investigation report.

Even assuming arguendo that the state's recommendation was raised because the petitioner rejected the pretrial plea bargain

offer, the petitioner's claim is totally devoid of any constitutional merit under this court's recent holding in Bordenkircher v. Haynes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978). In Bordenkircher, a defendant also claimed he was unconstitutionally penalized for exercising his right to a jury trial where, after he refused the prosecutor's plea bargain offer of a five-year sentence for forgery, he was re-indicted as a habitual offender and received a mandatory life sentence upon conviction by a jury. This court, rejecting the defendant's due process claim that he was unconstitutionally punished for exercising his right to a jury trial, stated that:

> "[I]n the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecutor's offer." 434 U.S. at 363.

Other federal cases have also held that a greater sentence received after a defendant exercises his right to a trial and is convicted than would have been given upon an exchange for a plea bargain is constitutionally permissible, and does not punish an accused for exercising that right to a trial. Corbitt v. New Jersey, 439 U.S. 212, 221-222, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978); United States v. Gardner, 611 F.2d 770, 773 (9th Cir. 1980); Cole v. Wainwright, 614 F.2d 67, 69 (5th Cir. 1980); and United States v. Litton Systems, Inc., 573 F.2d 195, 199 (4th Cir. 1978), cert. den. in 439 U.S. 828.

In fact, the action taken by the prosecutor in the case at bar was much less serious in terms of result to the petitioner than the prosecutor's action in Bordenkircher. In Bordenkircher, the prosecutor took direct action within his control by re-indicting the defendant as an habitual offender to insure that the defendant received a more severe punishment by not accepting the plea of guilty. In the case at bar, the prosecutor took no direct action within his control to insure that the petitioner received a more substantial penalty. All the prosecutor did was recommend life imprisonment at the time of sentencing. How-

ever, the trial court was the one who fixed punishment, and of course, the court was free to accept or reject the prosecutor's offer and decide sentence independent of any recommendation. Furthermore, were the petitioner correct in his assertion that his constitutional rights were violated by the prosecutor's action, then any defendant would be ill-advised to ever accept a guilty plea, because if he went to a trial and was convicted, he could never receive any more punishment than that that was offered by accepting a plea of guilty. This would essentially destroy the plea-bargaining system, which is an accepted method in our criminal justice system to process criminal cases. Bordenkircher v. Hayes, 434 U.S. at 361. Petitioner's first ground clearly does not state a claim for the issuance of a writ of certiorari, and this point should be dismissed.

II.

Petitioner's second claim is also devoid of constitutional merit, and should be dismissed. Petitioner has two parts to his second claim in this cross-petition for certiorari: (1) that he was denied his unrestricted right to peremptory challenges, and this has constitutional underpinnings in the case of Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 58 L.Ed.2d 466 (1965); and (2) that he should not be required to show prejudice on appeal from the trial court's refusal to permit him to change his peremptory challenges after he had exercised them.

Respondent is not certain whether petitioner has raised a question of constitutional import or rather one controlled by state law and procedure. While peremptory challenges are unquestionably a very important proponent of a criminal trial, it is not clear that the use or denial of the use of these challenges has reached constitutional proportions. See Stilson v. United States, 250 U.S. 583, 40 S.Ct. 28, 63 L.Ed. 1154 (1919); United States v. Vargas, 606 F.2d 341, 346 (1st Cir. 1979). However, if a defendant were arbitrarily or capriciously deprived of the use of his peremptory challenges that were

provided by state law, he would have a viable due process claim which could be reviewed by this court. Respondent submits that, on the basis of the record in the case at hand, no constitutional question is raised.

Respondent notes at the outset that petitioner is bound by the record of his trial. However, in his factual statement, at page 6, petitioner paints a far different picture than that which appears from the transcribed record of his trial. In his factual statement, petitioner alleges that a venireman, McKenna, was the second member of the jury panel called and seated in the jury box, and at that point, petitioner approached the bench and requested to amend his peremptory strikes to include McKenna. A far different picture of this situation appears from the relevant portions of the record:

> "MR. GORLA: Okay, I want to thank you everybody very much. I don't have any other questions, Judge.
>
> THE COURT: Thank you. Do you have anything further?
>
> MR. WALSH: I have nothing further, Your Honor. The panel is acceptable to the State.
>
> THE COURT: Gentlemen, we'll take a recess while you make your strikes. We'll take about a ten minute recess. We'll be in temporary recess.
>
> * * *
>
> (The following strikes were given the Bailiff:)
>
> State's Strikes:
>
> # 9 Hayles
>
> # 18 Greer
>
> # 20 Harris
>
> #23 Ruby
>
> #28 Dacus
>
> # 30 Townsend
>
> Alt: # 35 Lavely
>
> \- - - -
>
> Defendant's Strikes:

1 Caruso

3 Byers

5 Odem

7 Nibeck

11 Zenner

15 Reek

17 Melson

19 Long

21 Barlow

22 Bond

25 Bangert

31 Esteep

Alt: # 32 Lehmbeck

34 Mason

* * *

JURY SEATED

The following jury was then seated by the court (emphasis added):

2 Hoppe

4 McKenna

6 Bullington

8 Streb

10 Newsom

12 Sondermann

14 Borders

16 Warren

24 Gabbert

26 Teel

27 Thurber

29 Beauman

Alternate: # 33 Winchell

* * *

(The following proceedings then took place at the bench, out of the hearing of the jury:)

MR. GORLA: Judge, at this point I'm going to advise the Court that when I copied my strikes from

my list to the list I gave to the Bailiff, that I made a mistake. That I intended to strike the #4 juror, Mr. Edward McKenna and that because of the error on my part I didn't write it down on my list and consequently I strike an extra person. At this point I'd ask leave of court that I could amend my strikes and strike #4 and also take off one of the strikes that I gave to the Bailiff. [emphasis added].

THE COURT: It will be overruled.

MR. GORLA: Okay, Judge." (Tr. 68-71).

The record does not display that petitioner was in any way denied the exercise of his right to peremptory challenges as granted by state law. The relevant statute at the time of petitioner's trial, § 546.180(1), RSMo Supp. 1977, provided that:

"(1) If the offense charged is punishable by death or by imprisonment in the penitentiary for life, the state shall have the right to challenge six and the defendant twelve, and no more" [emphasis added].

The petitioner fully exercised his right as provided by Missouri statute, and peremptorily struck twelve members of the jury panel, listing two alternative strikes. Juror Edward McKenna was not among these strikes. The record indicates that a twelve member jury was then seated by the trial court (Tr. 70). After the jury was seated, petitioner's counsel approached the bench and informed the court of an alleged mistake, where petitioner wanted to strike juror McKenna, and that "[c]onsequently I strike an extra person" (Tr. 71). Yet, such an extra peremptory challenge would violate Missouri statute that provided for twelve peremptory strikes for the defendant, and no more." Compare United States v. Caldwell, 543 F.2d 1333 (D.C.Cir. 1974). At the bench conference, petitioner went on to tell the trial court that he would like to amend his strikes by striking McKenna and then taking off one of the other strikes which were given to the Bailiff (Tr. 71). However, there is no showing in the record that such a

procedure could viably have been done. There is no showing that the other stricken jurors were not already discharged by the court when the twelve member jury panel was seated, and even if they were, one of the jurors originally struck by the petitioner would now be placed on the jury due to the petitioner's action, and this could cause that potential juror to favor the petitioner by having that juror placed back upon the jury. For whatever the reason, the court indicated that such an amendment of the strikes could not be granted at that time. Petitioner acquiesed in that ruling, and made no attempt to expand the record on this issue, saying simply "Okay, Judge" (Tr. 71). As petitioner was freely allowed to exercise his peremptory challenges, but was merely not granted leave to correct an alleged mistake, there is no constitutional deprivation present as he was not denied arbitrarily or capriciously his right to the exercise of peremptory challenges as provided by Missouri law.

The second part of petitioner's contention raised herein is whether or not an appellate court can require a defendant to show prejudice by the trial court not allowing that defendant to amend his peremptory challenges after they have been exercised. Petitioner states that they cannot, citing dictum from Swain v. Alabama, supra, which cited Lewis v. United States, 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011 (1892), stating that "The denial or impairment of the right [to peremptory challenges] is reversible error without a showing of prejudice". Swain, id. at 219. Petitioner also cites United States v. Turner, 558 F.2d 535 (9th Cir. 1977), for the proposition that error in the restriction of a defendant's exercise of his peremptory strikes is reversible without a showing of prejudice. Respondent does not quarrel with either of those propositions, but contends that Lewis and Turner are inapposite to the case at hand. In Lewis, the procedure of a United States District Court was in issue, whereby the state and defendant secretly submitted their peremptory strikes to the court at the same time,

causing the defendant to waste three peremptory strikes on jurors that were also struck by the prosecution. This procedure was held to be unduly restrictive of the defendant's right to peremptorily challenge jurors, and was reversible apart from a showing of actual prejudice. Similarly, in Turner, the District Court also did not allow a defendant to exercise one of his allotted peremptory challenges. Id. at 537. Again, the court held that error in restricting the exercise of peremptory challenges results in an automatic reversal apart from a showing of prejudice. Id. at 538.

In the case at bar, the petitioner was not in any manner restricted from the exercise of his peremptory challenges. He made twelve peremptory strikes, including two alternatives, and submitted them to the Bailiff (Tr. 69-70). The twelve member jury was then seated, and petitioner's counsel approached the bench indicating that he wanted to amend his challenges to include a strike that was not previously taken (Tr. 71). Under these circumstances, Missouri law is very clear that the ability to amend peremptory challenges after all have been exercised and before the jury is sworn, is solely within the sound discretion of the trial court. State v. Brown, 554 S.W.2d 574, 578 (Mo.App., St.L.D. 1977); State v. Blankenship, 536 S.W.2d 520 (Mo.App., Spr.D. 1976). Further, where a defendant complained that the court would not allow him to amend his strikes to include a juror that was inadvertently not struck and by the defendant, he must make a showing that another juror is available, and that prejudice would have resulted due to the trial court's refusal to allow the amendment. State v. Harris, 356 S.W.2d 889 (Mo. 1962). Upon the record of appellant's trial[2], there was absolutely no showing that

---

[2]The Missouri Supreme Court was bound by the printed transcript on appeal, signed by petitioner's counsel (Tr. 244), and not on counsel's memory of what occurred at trial. State v. Bluitt, 592 S.W.2d 752 (Mo.banc 1980).

another juror was available for duty, nor was there any showing of prejudice by the court's refusal to allow petitioner to amend his strikes to include McKenna. Petitioner could not display any prejudice by the inclusion of McKenna on the twelve member jury that presided at his trial, nor did petitioner attempt to show, by way of strike for cause, that McKenna was biased or prejudiced or otherwise not qualified to serve as a juror. Under these circumstances, there was no constitutional deprivation by requiring petitioner to show prejudice in the trial court's refusal to allow him to amend his peremptory strikes to include McKenna. Compare United States v. Lepera, 443 F.2d 810 (9th Cir. 1971). Petitioner's second ground lacks constitutional merit, and is not a basis for issuance of a writ of certiorari.

CONCLUSION

WHEREFORE, respondent respectfully submits that the petitioner's cross-petition for writ of certiorari be denied as the issues raised herein do not display that petitioner was subject to any deprivation of his constitutional rights at trial.

Respectfully submitted,

JOHN ASHCROFT
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997